

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHAWN LAWRENCE DESAUTEL; TAMARA
DESAUTEL DAVIS; TONIA RENE
DESAUTEL,

Plaintiff,

v.

ANITA B. DUPRIS, in her individual capacity; DENNIS L. NELSON, in his individual capacity; GARY F. BASS, in his individual capacity; TRUDY FLAMMAND, in her individual capacity; STEVEN D. AYCOCK, in his individual capacity; LEE ADOPH, in his individual capacity; TED BESSETTE, in his individual capacity; TERRY FINLEY, in his individual capacity; MARGIE HUTCHINSON, in her individual capacity; JEANNE JERRED, in her individual capacity; ANDY JOSEPH, in his individual capacity; GENE JOSEPH, in his individual capacity; CHERIE MOOMAW, in her individual capacity; BRIAN NISSEN, in his individual capacity; DOUG SEYMOUR, in his individual capacity; VIRGIL SEYMOUR, in his individual capacity; THOMAS W. CHRISTIE, in his individual capacity; TIMOTHY W. WOOLSEY, in his individual capacity; JULIANA C. REPP, in her individual capacity; WAYNE SVAREN, in his individual capacity; COLVILLE BUSINESS COUNCIL; COLVILLE TRIBAL COURT.

NO. CV-11-0301-EFS

ORDER DENYING PLAINTIFFS' MOTIONS, GRANTING AND DENYING IN PART DEFENDANTS' MOTION, ENTERING JUDGMENT, AND CLOSING FILE

Defendants.

1 Before the Court, without oral argument, are Plaintiffs' Motion to
2 Strike Defendants' Notice of Appearance, ECF No. 3, Plaintiffs' Motion
3 for Sanctions, ECF No. 6, and Defendants' Motion to Dismiss, ECF No. 13.
4 After reviewing the filed material and relevant authority, the Court is
5 fully informed. For the reasons given below, the Court denies
6 Plaintiffs' motions and grants and denies in part Defendants' motion:
7 judgment is entered in Defendants' favor.

8 **A. Background**

9 Plaintiffs Shawn DesAutel, Tamara Davis, and Tonia DesAutel filed
10 this pro se lawsuit on August 16, 2011. The essence of Plaintiffs'
11 ninety-two-page Complaint and accompanying 439-pages of exhibits, ECF No.
12 1, is that the Colville Tribal Court and Business Council and individuals
13 with those entities ("Individual Defendants") (collectively "Defendants")
14 violated Plaintiffs' U.S. constitutional rights 1) by granting them
15 adopted tribal membership rather than enrolled tribal membership, 2)
16 through the process used to deny enrolled tribal membership, and 3) by
17 requiring Mr. DesAutel to pay the Colville Business Council's attorneys
18 fees and costs incurred as a result of his tribal-court lawsuits.
19 Although Plaintiffs are treated as adopted tribal members, Plaintiffs
20 seek enrolled tribal membership: enrolled tribal membership will allow
21 Plaintiffs to receive additional tribal per capita payments. Plaintiffs
22 ask the Court to set aside the Colville Business Council and Colville
23 Tribal Court's decisions and orders and find that Plaintiffs are entitled
24 to enrolled tribal membership and receipt of the accompanying per capita
25 payments.

26 The instant three motions followed the Complaint's filing.

1 **B. Plaintiffs' Motion to Strike**

2 Plaintiffs contend that defense counsel Everett B. Coulter, Jr.'s
3 August 19, 2011 appearance, ECF No. [2](#), in this matter was premature and
4 ineffective because Plaintiffs had not yet completed service on all of
5 the Individual Defendants, including Wayne Svaren, David Bonga, and
6 Dennis Nelson.

7 Local Rule 83.2(d)(1) allows an attorney to appear by filing a
8 formal notice of appearance. Mr. Coulter did so. ECF No. [2](#). Neither
9 the Federal Rules of Civil Procedure nor the Local Rules require counsel
10 to wait to file a notice of appearance until after the client has been
11 served. See *Kiro v. Moore*, 229 F.R.D. 228 (D.N.M. 2005) (recognizing
12 that an attorney may enter an appearance on a client's behalf before that
13 client was properly served). Although counsel typically file a notice
14 of appearance after the client is served, a client may learn of a lawsuit
15 through means other than service and request his lawyer appear for him
16 before service is completed. There being no objection by any Defendant
17 to Mr. Coulter's appearance on their behalf, the Court denies Plaintiffs'
18 motion to strike.

19 **B. Plaintiffs' Motion for Sanctions**

20 Plaintiffs ask the Court to sanction the Individual Defendants who
21 filed a waiver-of-service form that was prepared by their own counsel
22 rather than the waiver-of-service form sent by Plaintiffs. Under the
23 circumstances, the Court declines to impose Rule 11 sanctions. There is
24 no evidence that the Individual Defendants utilized their own waiver-of-
25 service-of-summons form for any improper purpose, to cause unnecessary
26 delay, or to needlessly increase the litigation costs. Instead, the

1 Individual Defendants utilized their own form in order to decrease
2 litigation costs and move the litigation along. Accordingly, Plaintiffs'
3 motion is denied.

4 **C. Defendants' Motion to Dismiss**

5 Defendants ask the Court to dismiss this lawsuit because 1) the
6 Court lacks subject matter jurisdiction over this lawsuit concerning an
7 intramural tribal matter for which Defendants enjoy sovereign immunity,
8 2) the Complaint fails to comply with Federal Rule of Civil Procedure
9 8(a) requirements, and 3) the Complaint fails to allege a claim upon
10 which relief can be granted as required by Rule 12(b)(6) because
11 Plaintiffs fail to state a federal question and satisfy the fraud-
12 pleading requirements. The Court addresses each of these arguments.

13 1. Subject matter jurisdiction

14 First, Plaintiffs suggest the question of subject matter
15 jurisdiction is intertwined with the merits of their allegations and,
16 therefore, the Court should deny Defendants' motion at this time because
17 there are genuine issues of material fact relating to Plaintiffs'
18 allegations, citing to *Miller v. Lifestyle Creations, Inc.*, 993 F.2d 883
19 (9th Cir. 1993) (unpublished opinion). The Court disagrees. The Court
20 can resolve the question of subject matter jurisdiction without
21 addressing the merits of Plaintiffs' allegations. Therefore, the Court
22 now turns to answer whether it has subject matter jurisdiction. See *Owen*
23 *Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978) (emphasizing
24 that a federal court is a court of limited jurisdiction and therefore it
25 must have subject matter jurisdiction).

26 This Court has subject matter jurisdiction over two categories of
disputes: 1) cases involving diversity-of-citizenship jurisdiction

1 pursuant to 28 U.S.C. § 1332; and 2) cases involving federal-question
 2 jurisdiction, encompassing those disputes "arising under the
 3 Constitution, laws or treaties of the United States," *id.* § 1331.
 4 Plaintiffs do not suggest that diversity-of-citizenship jurisdiction is
 5 present; rather in the Complaint, Plaintiffs identify 42 U.S.C. §§ 1983
 6 and 1985 and 18 U.S.C. § 241 as the bases for federal-question
 7 jurisdiction.¹ And in their response, Plaintiffs emphasize that they are
 8 not relying on the Indian Civil Rights Act or Indian Gaming Regulatory
 9 Act as a basis for federal-question jurisdiction.

10 The federal statutes relied on by Plaintiffs do not provide this
 11 Court with federal-question jurisdiction given the Complaint's
 12 allegations. Although §§ 1983 and 1985 can serve as a basis for federal-
 13 question jurisdiction, Plaintiffs' allegations do not involve action
 14 taken under the color of state law; rather the Complaint alleges actions
 15 taken under the color of tribal law. Neither §§ 1983 nor 1985 extend to
 16 provide a civil action for deprivation of rights by an individual acting
 17 under color of tribal law. *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir.
 18 1989) ("[A]ctions under section 1983 cannot be maintained in federal
 19 court for persons alleging a deprivation of constitutional rights under
 20 color of tribal law."). In addition, 18 U.S.C. § 241 is a criminal
 21 statute that does not provide an individual private cause of action. See
 22 *Peabody v. United States*, 394 F.2d 175, 177 (9th Cir. 1968).
 23 Accordingly, the Court grants Defendants' motion to dismiss because it
 24 lacks subject matter jurisdiction. See *Alvarado v. Table Mountain*
 25

26 ¹ In their response, Plaintiffs acknowledge the Complaint erroneously
 cites to 18 U.S.C. § 1985 rather than 18 U.S.C. § 241.
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1 *Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007) (dismissing lawsuit for
 2 lack of subject matter jurisdiction).

3 Even if there was a federal statute or law providing this Court with
 4 federal-question jurisdiction, the Court finds dismissal is also required
 5 because Defendants' tribal sovereign immunity has not been waived.
 6 Plaintiffs appear to acknowledge that, in order for this Court to have
 7 subject matter jurisdiction over Defendants, there must be a waiver of
 8 tribal sovereign immunity because, absent an express waiver by Congress,
 9 Indian tribes possess immunity from suit.² See *Santa Clara Pueblo v.*
 10 *Martinez* ("Santa Clara"), 436 U.S. 49, 58 (1978); *Dunn & Black, P.S. v.*
 11 *United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007). In addition,
 12 tribal agencies, instrumentalities, and individuals acting within their
 13 official capacity, such as the Colville Business Council, Colville Tribal
 14 Courts, and the Individual Defendants, are also protected by tribal
 15 sovereign immunity. See *Imperial Granite Co. v. Pala Band of Mission*
 16 *Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Wright v. Colville Tribal*
 17 *Enter. Corp.*, 159 Wn.2d 108, 113-14 (2006). Plaintiffs seem to argue
 18 that tribal sovereign immunity does not extend to the Individual
 19 Defendants; however, the exhibits attached to the Complaint clearly
 20 identify that the Individual Defendants were acting within their official

22 ² The Supreme Court has recognized,

23 Indian tribes are 'distinct, independent political communities,
 24 retaining their original natural rights' in matters of local
 25 self-government. Although no longer 'possessed of the full
 26 attributes of sovereignty,' they remain a separate people, with
 the power of regulating the internal and social relations.' They have power to make their own substantive law in internal
 matters, and to enforce that law in their own forums.

1 capacity. Accordingly, absent an "unequivocally expressed" waiver,
2 tribal sovereign immunity will prevent this Court from hearing this
3 lawsuit. See *Santa Clara*, 436 U.S. at 58; *Okla. Tax Comm'n v. Citizen*
4 *Band Potawatamoi Indian Tribe*, 498 U.S. 505, 509 (1991); *Hardin v. White*
5 *Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). And there is
6 a strong presumption against waiving tribal sovereign immunity. *Pan Am.*
7 *Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

8 There is no contention that Congress has waived Defendants' tribal
9 sovereign immunity. Rather, Plaintiffs ask the Court to find an
10 exception to *Santa Clara* because Defendants acted fraudulently and not
11 in compliance with the tribal code's processes when issuing their
12 decisions and orders, including the order requiring payment of attorneys
13 fees and costs by Mr. DesAustel. The Court acknowledges that Plaintiffs
14 are disappointed and frustrated with Defendants' decisions; however,
15 tribal membership is an internal tribal matter for which the Colville
16 tribe has laws that it may enforce in its own forum. See *Santa Clara*,
17 436 U.S. at 55-56. And Congress has not expressly limited, modified, or
18 eliminated the Colville tribe's authority in this regard. Although
19 Plaintiffs contend that Defendants' actions were arbitrary and unjust,
20 this Court will not interfere with the procedures established by the
21 Colville tribe to address tribal membership matters, as such interference
22 "plainly would be at odds with the congressional goal of protecting
23 tribal self-government." *Santa Clara*, 436 U.S. at 64.

24 In sum, the Court lacks subject matter jurisdiction because there
25 is no federal-question jurisdiction and tribal sovereign immunity
26 protects Defendants from Plaintiffs' allegations relating to an
intramural tribal matter. Finally, even if this Court had jurisdiction
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1 over this lawsuit, this Court would decline to hear Ms. Davis' and Ms.
2 DesAutel's claims because they did not exhaust their tribal remedies.
3 See *Boozer v. Wilder*, 381 F.3d 931, 935-37 (9th Cir. 2004) (recognizing
4 that exhaustion is a matter of comity).

5 2. Rule 8(a)

6 Defendants also ask the Court to dismiss the ninety-two page
7 Complaint on the grounds that it violates Rule 8(a)'s short-and-concise
8 requirement. Plaintiffs submit that their Complaint is an appropriate
9 length given that they were required to summarize a number of tribal
10 court matters that spanned more than five years. Because a Court is
11 required to provide certain latitude to the pleadings filed by a pro se
12 and because the Complaint, while lengthy, identifies the claims brought
13 by Plaintiffs and the allegations supporting the claims, the Court denies
14 Defendants' motion for lack of compliance with Rule 8(a).

15 3. Rule 12(b)(6)

16 The Court addressed the majority of Defendants' failure-to-state-a-
17 claim arguments above in connection with the federal-question discussion.
18 Yet Defendants also sought dismissal of Plaintiffs' fraud claim, if one
19 was so pled, because the fraud allegations fail to comply with Rule 9(b)
20 requirements. In their response, Plaintiffs do not identify that they
21 are pursuing a fraud claim. Accordingly, the Court denies Defendants'
22 motion as moot on this basis. Regardless, the Court would not have
23 jurisdiction to hear this state-court claim.

24 **D. Conclusion**

25 For the above-given reasons, **IT IS HEREBY ORDERED:**

26 1. Plaintiffs' Motion to Strike Defendants' Notice of Appearance,
ECF No. 3, is **DENIED**.

1 2. Plaintiffs' Motion for Sanctions, **ECF No. 6**, is **DENIED**.

2 3. Defendants' Motion to Dismiss, **ECF No. 13**, is **DENIED** (Rule 8(a)

3 and **GRANTED** (otherwise).

4 4. **Judgment** shall be entered in Defendants' favor.

5 5. All hearing dates are **STRICKEN**.

6 6. This file shall be **CLOSED**.

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter
8 this Order and forward a copy to Plaintiffs and counsel.

9 **DATED** this 21st day of October 2011.

10
11 S/ Edward F. Shea

12 EDWARD F. SHEA

13 United States District Judge

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